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In the
Supreme Court of the United States
OCTOBER TERM, 1967
No. 660

BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1, TOWNS OF EAST GREENBUSH, NASSAU, SCHODACH, SAND LAKE AND NORTH GREENBUSH, RENSSELAER COUNTY AND CHATHAM, COLUMBIA COUNTY AND BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 3, TOWNS OF NORTH HEMPSTEAD AND OYSTER BAY, NASSAU COUNTY, NEW YORK,
APPELLANTS,

v.

JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York,
APPELLEE,

- and -

MICHAEL ROCK, ANTHONY DWILESKI, PETER GIRZONE, DOREEN BEAUDIN, CHARLES HAIGH AND BARBARA BRENNAN,
INTERVENORS-APPELLEES.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR AMICUS CURIAE
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INDEX

	Page
Interest of the Amici	2
Statement of the Case	4
Questions Presented	7
Argument	8
Argument:	
I. The Lending of Textbooks to All New York School Children, Including Those Who Attend Church-Related Schools in Grades Seven to Twelve, Pursuant to the Provisions of New York's Education Law #701.3, Is Not Violative of the Fourteenth Amendment of the Constitution of the United States.	8
Conclusion	29

Table of Citations

Cases

Baskin v. *Industrial Accident Commission*, 338 U.S. 854	13
Board of Education v. *Allen*, 281 N.Y. 2d 799, 228 N.E. 2d 791	6, 7, 18, 29, 30
Bowerman et al v. *John J. O'Connor*, Rhode Island Supreme Court No. 287-A	3
Bradfield v. *Roberts*, 175 U.S. 291	13, 22
Chance v. *Mississippi State Textbook Board*, 190 Miss. 453, 469 200 So 706, 710	25
Cochran v. *Board of Education*, 281 U.S. 370	8, 9, 10, 11, 15, 19, 25
Eaton v. *Price*, 360 U.S. 246	13
Engel v. *Vitale*, 370 U.S. 421	12, 20, 21
Everson v. *Board of Education*, 330 U.S. 1, 16, 18	7, 9, 12, 13, 14, 15, 18, 19, 20, 24, 25, 26, 27, 30
General Finance Co. v. *Archetto*, 93 R.I. 392	12
Gibbons v. *District of Columbia*, 116 U.S. 404	12

Page

Gitlow v. *N. Y.*, 268 U.S. 652 ..... 9, 10, 11
Griswold v. *Connecticut*, 381 U.S. 479, 482 29
Hamilton v. *Board of Regents*, 293 U.S. 245 ..... 10, 11
McCollum v. *Board of Education*, 333 U.S. 203 ..... 12, 20
Near v. *Minnesota*, 288 U.S. 697 10
Pierce v. *Society of Sisters*, 268 U.S. 510 29
Rhoades v. *School District*, 424 Pa. 202, 226 A2d 53 20
School District v. *Schempp*, 374 U.S. 203 ..... 12, 14, 18, 19, 20, 27
Sherbert v. *Verner*, 374 U.S. 398, 404, 410 29
Snyder v. *Town of Newton*, 365 U.S. 299 ..... 12, 20
Thorpe v. *Housing Authority*, 385 U.S. 670 ..... 29, 30
Worrell v. *Matters*, 424 Pa. 202, 226 A2 53 20
Zorach v. *Clauson*, 343 U.S. 306 12

STATUTES AND RULES

United States Constitution:
First Amendment 2, 3, 5, 6, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 29, 30
Fourteenth Amendment 2, 3, 8, 9, 10, 11, 13, 15, 18
New York State Constitution:
Article XI, Section 3 ..... 5, 6
Statutes and Rules:
20 U.S.C.A. § 821-27 28
20 U.S.C.A. § 241e 29
New York Education Law, as amended L. 1965, C. 320, § 2, L. 1966, C. 795, 16 McKinney's Consol. Laws of New York, § 701.3 ..... 2, 4, 5, 6, 7, 8, 23, 24
Louisiana Rev. Stat. Tit. 17, § 351 (1963) 3
Mississippi Code Ann. 1942, Tit. 24, § 6656 (1952) 3
Gen. Laws of Rhode Island, 1956, § 16-23-2 (Supp. 1965) 2
West Virginia Code Ann. § 18-5-21b (1966) 3
Burns Indiana Stat. Ann. 1933, § 28-512 (1948) 3

Page

Kansas Stat. Ann. § 72-4107 (1964) 3

Rules of the United States Supreme Court:

Rule 42(4) 2

Other Authority:

Cushman, Robert F., Public Support of Religious Education in American Constitutional Law, 45 Northwestern Univ. L. Rev. 333, 347 (1950) 20

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APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

AMICUS CURIAE BRIEF

Interest of the AMICI

This brief is submitted persuant to Rule 42(4) of the Rules of the United States Supreme Court on behalf of the Attorney General of Rhode Island and other interested public officials similarly situated.

The Attorney General of Rhode Island is interested in the outcome of the instant case because a Rhode Island statute similar to the New York Statute challenged in this case (Laws of 1965, ch. 320: Education Law, # 701.3; McKinney's Consol. Laws of New York) is the subject of litigation in Rhode Island. This law, Section 16-23-2 of the Rhode Island General Laws (1956), as amended, was declared unconstitutional on September 19, 1967 by a justice of the Superior Court in a decision which is now on appeal before the Rhode Island Supreme Court. The Rhode Island judgment now on appeal rested, as one ground, on the Fourteenth Amendment as "incorporating" the non-establishment clause of the First Amendment.

The challenged Rhode Island statute provides as follows:

> "*16-23-2. Loan of textbooks.* — The School committee of every community as the same is defined in [§ 16-7-16] shall furnish upon request at the expense of such community, textbooks in the fields of mathematics, science and modern foreign languages appearing on the published list of textbooks recommended by the commissioner of education as provided in § 16-1-9 of the general laws, as herein amended, to all pupils of elementary and secondary school grades resident in such community, said textbooks to be loaned to such pupils free of charge, subject to such rules and regulations as to care and custody as the school committee may prescribe.
>
> "Every such school committee shall also furnish at

> the expense of such community all other textbooks and school supplies used in the public schools of said community, said other textbooks and supplies to be loaned to the pupils of said public schools free of charge, subject to such rules and regulations as to care and custody as the school committee may prescribe. School books removed from school use may be distributed to pupils, and any textbook may become the property of a pupil who has completed the use of it in school, subject to rules and regulations prescribed by the school committee."

In a brief filed as an intervening defendant-appellant in the case of *Frederick E. Bowerman et al* v. *John J. O'Connor, Jr., et al,* (Rhode Island Supreme Court No. 287-A) the attorney general of Rhode Island has urged the reversal of the decision of the Superior Court judge noted above and has argued that the challenged Rhode Island statute in no way constitutes an establishment of religion in violation of the Fourteenth Amendment as "incorporating" the establishment clause of the First Amendment of the Constitution of the United States.

This brief is submitted to demonstrate that the New York law in issue in this case is, like the Rhode Island statute noted above, a valid exercise of the power of the state to provide secular educational benefits to all children regardless of the school they attend. This brief also urges that the laws in five states, in addition to New York and Rhode Island, which permit textbooks to be loaned to children attending private schools are also constitutional. La. Rev. Stat. Tit. 17, §351 (1963); Miss. Code Ann. 1942, Tit. 24, §6656 (1952); W.Va. Code Ann. §18-5-21b (1966); Burns Indiana Stat. Ann. 1933, §28-512 (1948); Kansas Stat. Ann. §72-4107 (1964).

Statement of the Case

For purposes of this brief, we adopt the Statement of Case contained in the brief of Michael Rock, et al, intervenors-appellees, as follows:

Chapter 320 of the New York Laws of 1965 and Chapter 795 of the Laws of 1966 (effective September 1, 1966) amend Section 701 of the New York Education Law to provide, *inter alia,* that the boards of education throughout the state shall purchase textbooks "designated for use in any public, elementary or secondary schools of the state or . . . approved by any boards of education, trustees or other school authorities" and loan them "upon individual request, to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law. . . ." The textbooks are not loaned to any school. They are made available directly to the pupils.

The amended Section 701 embodies the New York Legislature's recognition that availability to all children of high quality education in secular subjects is a matter of pressing public concern. The preamble declaring the Legislature's purposes in enacting the amendment to Section 701 states:

> "Section 1. Statement of policy. The security and welfare of the nation require the fullest development of the mental resources and skills of its youth. This calls for more adequate educational opportunities and increased efforts to educate more of the talent of our nation and requiring the correction of those imbalances in our educational programs which have led to an insufficient proportion of our population educated in the field of science, mathematics, foreign languages and other non-sectarian subjects. The Congress of the United States has reaffirmed the principle that the states and local communities retain primary respon-

> sibility for public education. It is hereby declared to be the public policy of the state that the public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense and the general welfare of the state." N. Y. Sess. Laws 1965, Ch. 320, § 1.

Appellants' complaint herein sought a declaratory judgment that Section 701.3 of the New York Education Law is contrary to the New York State Constitution and the Establishment Clause of the First Amendment to the extent that it requires the purchase of textbooks with public moneys for free loan to pupils in church-related schools. Appellants nowhere claim that the statute is unconstitutional in so far as it provides for the loan of books to pupils attending public schools or non-religiously-affiliated private schools.

The Supreme Court, Albany County, ruled that plaintiffs had standing to sue and ruled in favor of plaintiffs on the merits (63-72; 51 Misc. 2d 297, 273 NYS 2d 239 (1966)). The Appellate Division, Third Department, held that plaintiffs lacked standing to sue. (88-90; 27 A.D. 2d 69, 276 N.Y. S. 2d 234 (1966)). Although three of the justices in the Appellate Division, because of their finding that the plaintiffs lacked standing to sue, found it unnecessary to rest their decision on the merits all five Justices were unequivocal in their opinion that the statute was not in violation of either the New York or the United States Constitution. (89, 96-104; 27 A.D. 2d at 71, 75-80, 276 N.Y. S2 at 237, 241-46.)

The Court of Appeals reached the merits, holding that the statute was a constitutional exercise of the New York Legislature's authority to provide for the secular education of all children within the state, and did not contravene

either Article XI, Section 3 of the New York Constitution or the First Amendment to the Federal Constitution. (13-28; 20 N.Y.2d 109, 228 N.E.2d 791 (1967). The court dealt first with constitutionality under Article XI, § 3 of the New York Constitution, which prohibits use of state money, property, or credit "directly or indirectly, in aid or maintenance" of any church-related school. The court held that, since Section 701 was designed not to aid religion either directly or indirectly but to benefit all school children by improving their secular education, "any benefit accruing to . . . [religiously-affiliated] schools is a collateral effect of the statute, and, therefore, cannot be properly classified as the giving of aid directly or indirectly." (20; 20 N.Y. 2d at 116, 228 N.E.2d at 794). The court noted the similarity of the textbook loan program to the activities of public libraries, which routinely loan books to parochial school students without any suggestion that the state is thereby providing unconstitutional aid to religiously-affiliated schools.

The Court observed that:

> "No one in the last third of the 20th Century can doubt that a program aimed at improving the quality of education in all schools is a matter of legitimate state concern . . .
>
> At a time when we have large-scale Federal and State aid to education, it is justly feared that children who are denied these benefits may receive education inferior to children in public schools. Unless certain types of aid can be made available to *all* children, we run the risk of creating an educational lag between children in public and private schools." (20-21; 20 N.Y.2d at 116-17, 228 N.E.2d at 794)

The Court firmly held that there was no violation of the First Amendment:

"The State makes no affirmation of religious beliefs or activities within the public schools. Section 701 remains completely neutral with respect to religion, merely making available secular textbooks at the request of the individual student and asking no question about what school he attends. Despite the flexibility of the English language, it is impossible to conclude that loaning non-religious textbooks to all students, including those who attend a parochial school establishes a religion or constitutes the use of public funds to aid religious schools. (Cf. *Everson* v. *Board of Educ.*, 330 U.S. 1, 16, 18).

"As a practical matter, to deny private school children the benefit of the State aid provided by section 701 could widen the gap between those children in deprived areas who attend parochial schools and those attending public schools in the same areas who receive the benefits of all the many and necessary programs backed by the massive resources of both State and Federal Governments." (21-22; 20 N.Y. 2d at 117-18, 228 N.E.2d at 794-95).

The dissenting judges, while declaring that amended Section 701 infringed the New York Constitution, gave no definitive opinion with respect to the status of Section 701 under the Federal Constitution, but merely expressed uncertainty in that regard. (24-28; 20 N.Y.2d at 120-24, 228 N.E.2d at 796-99).

Question Presented

1. Does the lending of secular textbooks to all New York school children, including those attending church-related schools in grades seven to twelve, pursuant to the provisions of New York's Textbook Loan Law, constitute an

establishment of religion which violates any provision of the Fourteenth Amendment of the Constitution of the United States, insofar as that Amendment may incorporate any portion of the First Amendment?

Argument

I. THE LENDING OF TEXTBOOKS TO ALL NEW YORK SCHOOL CHILDREN, INCLUDING THOSE WHO ATTEND CHURCH-RELATED SCHOOLS IN GRADES SEVEN TO TWELVE, PURSUANT TO THE PROVISIONS OF NEW YORK'S EDUCATION LAW # 701.3, IS NOT VIOLATIVE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

The Court of Appeals in the instant case held the New York textbook statute not to violate the establishment clause of the First Amendment to the Constitution of the United States, as made applicable to the States through the Fourteenth Amendment. With due recognition of the difficulty of the constitutional issue raised under the First Amendment, it is submitted that this decision reflects the law as it is and as it ought to be.

Initially, it is clear that the only arguably plausible federal constitutional objection to the textbook statute involves the Fourteenth Amendment, assuming that the Fourteenth inhibits the States just as the establishment clause of the First Amendment inhibits the Congress. Any argument that State taxation for the purpose of supplying textbooks to school children, including those attending church-related schools, amounts to the taking of property for a private purpose in violation of the due process clause of the Fourteenth Amendment was foreclosed emphatically by the decision in

Cochran v. *Board of Education*, 281 U.S. 370 (1930)

In that case, the Court validated a Louisiana textbook statute similar in legal effect to that now at issue. As the Court stated, citing *Cochran*, in

Everson v. *Board of Education*, 330 U.S. 1, 7 (1947)

> "It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose."

Cochran establishes beyond question that the teaching of secular subjects in a parochial school constitutes the performance of a *public function* and that a State may furnish at public expense secular textbooks to parochial and public school children alike, without thereby violating the Fourteenth Amendment.

The fact that *Cochran* was decided in 1930 does not lessen its First Amendment significance. On the contrary, the Supreme Court, five years before *Cochran* and twice shortly after *Cochran*, stated that the Fourteenth Amendment protected certain of the fundamental personal rights and liberties protected by the First against abridgement by Congress. In *Gitlow* v. *New York*, 268 U.S. 652 (1925), Mr. Justice Sanford wrote for the majority, (p. 666):

> "For present purposes we may and do assume that freedom of speech and of the press — which are protected by the First Amendment from abridgement by Congress — are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."

Justice Holmes and Brandeis, though they dissented from the Court's judgment, agreed with the substance of the statement just quoted. Holmes wrote (p. 672):

> "The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word 'liberty' as there used, although perhaps it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs, or ought to govern, the laws of the United States."

Thus all the justices, in 1925, accepted the principle that the Fourteenth included some First Amendment liberties. On June 8, 1925, the day *Gitlow* was handed down, the Court consisted of Chief Justice Taft, and Associate Justices Holmes, Van Devanter, McReynolds, Brandeis, Sutherland, Butler, Sanford, and Stone. On April 28, 1930, when the Court decided *Cochran,* Chief Justice Hughes had replaced Taft, and associate Justice Sanford had died. Otherwise the Court was composed of the same men who had decided *Gitlow* five years earlier.

In *Near* v. *Minnesota,* 283 U.S. 697, 707 (1931), Chief Justice Hughes writing the Court's opinion, cited *Gitlow* in support of his statement "It is no longer open to doubt that the liberty of the press, and of speech; is within the liberty safeguarded by the due process clause of the Fourteenth Amendment . . ."

In *Hamilton* v. *Regents,* 293 U.S. 245 (1934), the unanimous Court decided that compulsory military training, required of students at the University of California, a State institution, did not deprive plaintiff-students of their freedom of religion without due process of law. In his opinion for the Court, Mr. Justice Butler, discussing the Fourteenth Amendment, stated (P. 262):

> "There need be no attempt to enumerate or comprehensively to define what is included in the 'liberty' protected by the due process clause. Undoubtedly it does include the right to entertain the beliefs, to adhere to the principles and to teach the doctrines on which these students base their objections to the order prescribing military training. (Citations omitted).

Mr. Justice Cardozo's concurring opinion in *Hamilton,* in which Justices Brandeis and Stone joined, contains the following statement (pp. 265-66):

> "I assume for present purposes that the religious liberty protected by the First Amendment against invasion by the nation is protected by the Fourteenth Amendment. . . . The First Amendment, if it be read into the Fourteenth, makes invalid any state law 'respecting an establishment of religion or prohibiting the free exercise thereof.' Instruction in military science is not instruction in the practice or tenets of a religion. Neither directly nor indirectly is government establishing a state religion when it insists upon such training. Instruction in military science, unaccompanied here by any pledge of military service, is not an interference by the state with the free exercise of religion when the liberties of the constitution are read in the light of a century and a half of history. . . ."

When the Court decided *Hamilton* in 1934, Justices Roberts and Cardozo had been added, and Holmes had resigned. Otherwise *Hamilton* was decided by the same Court which had decided *Cochran* in 1930. Six of the *Hamilton* Justices had sat on the Court which decided *Gitlow* in 1925. It seems difficult to believe that in 1930 the *Cochran* justices were unaware that the Fourteenth Amendment guaranteed a

number of liberties of the First; it is impossible to believe that in 1930 the Court would have upheld a State law which impeded the free exercise of religion.

From Cochran, down to the present day, the Supreme Court has never held invalid any State law which aids school children at public expense, but which contains no element of religious constraint. The Supreme Court of the United States has invalidated religious instruction in public schools, even when given by unpaid volunteer teachers, *McCollum* v. *Board of Education,* 333 U.S. 203 (1948); it has invalidated prayers and devotional bible-reading in public schools. *Engel* v. *Vitale,* 370 U.S. 421 (1962); *School Dist.* v. *Schempp; Murray* v. *Curlett,* 374 U.S. 203 (1963). In all instances the school child could get excused from the exercise; but some pressure, some embarrassment, some public urging to conform, necessarily inhered in the system. Children do not like obviously to differ from their fellows.

The Supreme Court has repeatedly upheld transportation of schoolchildren at public expense, to public and parochial schools alike. *Everson* v. *Board of Education,* 330 U.S. 1 (1947); *Snyder* v. *Town of Newton,* 365 U.S. 299 (1961) (appeal from Supreme Court of Connecticut dismissed for want of a substantial federal question). The Supreme Court upheld the release from public school for stated hours of pupils whose parents wished them to attend religious instruction elsewhere. *Zorach* v. *Clauson,* 343 U.S. 306 (1952). It has upheld tax exemption of "Buildings for religious purposes and the land on which they stand, not exceeding one acre, to the extent such buildings and land are used for religious *or educational purposes;*" (Emphasis added), *General Fin. Co.* v. *Archetto,* 93 R.I. 392 (1961), appeal dismissed for want of a substantial federal question, 369 U.S. 423 (1962). See also *Gibbons* v. *District of Columbia,* 116 U.S. 404 (1886).

> "Votes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case. . . ." M Justice Brennan, in *Eaton* v. *Price,* 360 U.S. 246 (1959). And see *Baskin* v. *Industrial Accident Comm'n.,* 338 U.S. 854 (1949).

See also *Bradfield* v. *Roberts,* 175 U.S. 291 (1899).

Various expressions of Justices, uttered in opinions for the Court, or in special concurring opinions, or in dissents, suggest that the "establishment clause" of the First Amendment is "incorporated" *literatim* in the due process clause of the Fourteenth.

The decisions of the Supreme Court of the United States when marshalled, fall into a logical and sensible pattern. When public power of a State takes some action which inhibits or embarrasses some person in connection with his religion, the Supreme Court has struck it down. But when a taxpayer has complained that tax money is spent for the secular benefit of a schoolchild or for a sick person, with no element of personal constraint in connection with religion, the court has uniformly upheld the State action.

And certainly the Supreme Court has never struck down such a State practice as that in New York where a schoolchild is merely permitted to borrow secular textbooks provided by the state for the student's own use, without regard to what school he attends. No decision of the Supreme Court of the United States has suggested that because such a child then takes the book to use in a church-related school, the distribution by the State is a violation of some constitutional prohibition latent and unstated in the Fourteenth Amendment.

The Court of Appeals in the instant case quite properly recognized *Everson* v. *Board of Education, supra,* as the

single most important precedent with respect to the issues here to be determined. In the *Everson* case, the Court had occasion to consider, for the first time, the problem of governmental aid to parochial school pupils within the context of the First Amendment. In that case, Mr. Justice Black, speaking for a majority of the Court, made the following general statement (pp. 15-16):

> "The 'establishment of religion' clause of the First Amendment means at least this: . . . No tax in any amount, large or small, can be levied to support *any religious activities or institutions* whatever they may be called, or whatever form they may adopt *to teach or practice religion.* . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state.'" (Citation omitted. Emphasis added).

Beyond the seemingly straightforward nature of the above formulation, however, the Court in *Everson* was intimately aware of what it termed (p. 14) the:

> "difficulty in drawing the line between tax legislation which provides funds for the Welfare of the general public and that which is designed to support institutions which teach religion."

This, of course, is the crucial issue in this case: How do we distinguish aid to the public in general from aid to religion in particular? Mr. Justice Clark, speaking for the Court in *School Dist.* v. *Schempp,* 374 U.S. 203 (1964), enunciated the relevant considerations necessary to make such a determination, when he stated (p. 222):

> "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause *there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.*" (Citations omitted. Emphasis added).

The *Everson* case, *supra,* represents the most difficult and significant attempt heretofore to apply the establishment clause to a particular type of governmental aid. At issue in that case was a New Jersey statute which authorized local school districts to make rules and contracts relating to the transportation of children to and from schools. Pursuant to this statute, a township board of education authorized reimbursements to parents for money expended by them for the bus transportation of their children by the public transportation system. A portion of the funds was used for the payment of transportation of certain children to Catholic parochial schools. These schools provided, beside regular secular education, "regular religious instruction conforming to the religious tenets and modes of worship of the Catholic Faith." The appellant, a district taxpayer, challenged the payment of funds to the parents of parochial school students on the grounds, among others, that such payments violated the due process clause of the Fourteenth Amendment and constituted an establishment of religion within the meaning of the First Amendment, which Everson contended was made applicable to the States by the Fourteenth. After disposing of the due process argument on the authority of *Cochran, supra,* the Court proceeded to consider whether the New Jersey statute was "a law respecting an establishment of religion." Having

broadly characterized the limits of State power under the establishment clause in the previously quoted portion of his opinion, Mr. Justice Black paused to consider the relevance of the complementary free exercise clause (p. 16):

> "While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, *to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benfits to all its citizens without regard to their religious belief.*" (Emphasis added).

The groundwork thus having been laid, the Court held that the operation and effect of the New Jersey statute did not constitute an establishment of religion.

The Court stated (p. 17-18):

> "Measured by these standards, we cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools. It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the state. The same possibility exists where the state requires a local transit company to provide reduced fares to school children including those attending parochial schools, or where

a municipally owned transportation system undertakes to carry all school children free of charge. Moreover, state-paid policemen, detailed to protect children going to and from church schools from the very real hazards of traffic, would serve much the same purpose and accomplish much the same result as state provisions intended to guarantee free transportation of a kind which the state deems to be best for the school children's welfare. And parents might refuse to risk their children to the serious danger of traffic accidents going to and from parochial schools, the approaches to which were not protected by policemen. Similarly, parents might be reluctant to permit their children to attend schools which the state had cut off from such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks. Of course, cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it it to favor them." (Emphasis added.)

Obviously, the Court recognized the fact that the New Jersey statute might aid parents in sending their children to parochial schools, indirectly benefitting those schools, The Court also recognized that providing certain other welfare services, such as police and fire protection, sewerage and highways, resulted in much the same sort of incidental benefit, in the sense that the denial of those services

"would make it far more difficult for the schools to operate." Nevertheless, the *Everson* decision sanctioned such incidental aid in areas where the service provided by the State was "so separate and indisputably marked off from the religious function." In sum, the Court viewed the establishment clause as requiring of a State only *neutrality* in its relations with religious believers and non-believers, and not hostility.

It must be noted that *Everson* did not assert that the constitutional limit of a State's power under the Fourteenth Amendment, applying any principle of the First, may be defined in terms of the amount of money to be expended under a particular legislative enactment. Surely this cannot be a valid constitutional test. Would the Court in *Everson* have struck down the New Jersey statute had it provided that pupils were to be transported to their schools in more expensive buses. We suggest that the actual or potential monetary scope of a statute is not a relevant or permissible measure of its constitutionality. The relevant issue concerns the maximum scope of legislative power under the constitutional mandate, not the particular extent to which a legislature, in its wisdom, may choose to implement that power.

The scope of permissible legislative power is also to be measured by the standard declared by the Supreme Court, namely, whether the enactment has a *secular legislative purpose and a primary effect that neither advances nor inhibits religion. School Dist.* v. *Schempp*, 374 U.S. 203, 222 (1964). It is impossible to declare that the legislative purpose behind the New York textbook statute is other than secular or that the *primary* effect of its implementation is either to advance or inhibit religion.

The decision of the Court of Appeals in the *Allen* case, 281 N.Y. 2d 799 228 NE 2d 791, follows these principles when it states "that there is no federal constitutional ques-

tion under the establishment clause of the First Amendment" because the Textbook Loan Law "remains completely neutral with respect to religion, merely making available secular textbooks at the request of the individual student and asking no question about what school he attends." 228 N.E. 2d 791, at 794.

The decision below thus follows the so-called "child-benefit" theory underlying *Cochran* and implicit in the *Everson* decision. As stated by the Supreme Court in *Cochran,* in upholding the Louisiana textbook law:

> "One may scan the acts in vain to ascertain where any money is appropriated for the purchase of school books for the use of any church, private, sectarian or even public school. The appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them. It was for their benefit and the resulting benefit to the state that the appropriations were made. True, these children attend some school, public or private, the latter, sectarian or non-sectarian, and that the books are to be furnished them for their use, free of cost, whichever they attend. The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them. The school children and the state alone are the beneficiaries. . . . What the statutes contemplate is that the same books that are furnished children attending public schools shall be furnished children attending private schools. . . ." pp. 374-375.

This rigorously logical reasoning in the unanimous ruling in *Cochran* has not been modified but rather reinforced by *Everson* and *Schempp.* The dissent in the Court of Appeals

suggests hesitatingly that *McCollum* (supra), *Engel,* (supra) and *Schempp* "seem to have outdistanced *Cochran*" (228 NE 2d 791 at 797) but the fact is that *Cochran, Everson* and *Schempp* affirm and reaffirm that the state neutrality between religion and irreligion is the basic guideline in applying the establishment clause of the First Amendment. Indeed *Everson*'s stature as a precedent has been enhanced in succeeding years, as witness the fact that all attacks on state bus transportation laws have been rejected by the Supreme Court as failing to represent any substantial federal question. See, e.g., *Snyder* v. *Town of Newton,* 365 U.S. 299 (1961); *Rhoades* v. *School Dist.,* 424 Pa. 202, 226 A.2d 53, *appeal dismissed,* 88 S.Ct. 61 (1967); *Worrell* v. *Matters,* 424 Pa. 202, 226 A.2d 53, Cert. denied, 88 S.Ct. 36 (1967).

We submit that the rule of *Everson* is simply that government aid may be rendered to a citizen in furtherance of his obtaining secular education in a church-related school. The guiding principle of the case, as stated, requires the state to maintain neutrality in its relations with groups of religious believers and non-believers. *Everson, supra,* p. 18. Whatever may be the type of state aid to religion proscribed by *Everson,* on the other hand, it is clearly not:

> ". . . . those incidental advantages that religious bodies, with other groups similarly situated obtain as a by-product of organized society."
>
> *McCollum* v. *Board of Education,* 333 U.S. 203, 249 (1948) (dissenting opinion).

Professor Robert F. Cushman well stated in his article:

> *Public Support of Religious Education in American Constitutional Law.* 45 Northwestern Univ. L. Rev. 333, 347 (1950):

> "Religion does and should, as part of the public, share in the benefits extended to the public in general. To hold otherwise is to adopt a position which would permit the state to make of religion an outlaw having no rights which the law is bound to protect."

There are numerous examples, at both the state and federal levels, of financial "aid" which religious bodies receive from government "as a by-product or organized society." A few such examples were summarized by Mr. Justice Douglas in *Engel* v. *Vitale,* 370 U.S. 421, 437 n. 1 (1962) (concurring opinion):

> "There are many 'aids' to religion in this country at all levels of government. To mention but a few at the federal level, one might begin by observing that the very First Congress which wrote the First Amendment provided for chaplains in both Houses and in the armed services. There is compulsory chapel at the service academies, and religious services are held in federal hospitals and prisons. The President issues religious proclamations. The Bible is used for the administration of oaths. N.Y.A. and W.P.A. funds were available to parochial schools during the depression. Veterans receiving money under the 'G.I.' Bill of 1944 could attend denominational schools, to which payments were made directly by the government. During World War II, federal money was contributed to denominational schools for the training of nurses. The benefits of the National School Lunch Act are available to students in private as well as public schools. The Hospital Survey and Construction Act of 1946 specifically made money available to non-public hospitals. The slogan 'In God We Trust' is used by the Treasury Department and Congress recently added God

> to the pledge of allegiance. There is Bible-reading in the schools of the District of Columbia, and religious instruction is given in the District's National Training School for Boys. Religious organizations are exempt from the federal income tax and are granted postal privileges. Up to defined limits — 15 per cent of the adjusted gross income of individuals and 5 per cent of the net income of corporations — contributions to religious organizations are deductible for federal income tax purposes. There are no limits to the deductibility of gifts and bequests to religious institutions made under the federal gift and estate tax laws. This list of federal 'aids' could easily be expanded, and of course there is a long list in each state". (Citation omitted).

See also

Bradfield v. *Roberts,* 175 U.S. 291 (1899).

where the Court upheld a direct appropriation made to a hospital operated under the auspices of the Roman Catholic Church, which, in fact, exercised "great and perhaps controlling influence over the management of the hospital." The most significant aspect of the *Bradfield* decision is the court's direct disavowal of the contention that religious institutions performing public functions cannot, consistently with the establishment clause be aided by government. The Court said (p. 297):

> "It is claimed that the allegation in the complainant's bill, that the said 'Providence Hospital is a private eleemosynary corporation, and that to the best of complainant's knowledge and belief, it is composed of members of a monastic order or sisterhood of the Roman Catholic Church, and is conducted under the

auspices of said church; that the title to its property is vested in the Sisters of Charity of Emmitsburg, Maryland,' renders the agreement void for the reason therein stated, which is that Congress has no power to make 'a law respecting a religious establishment' a phrase which is not synonymous with that used in the Constitution, which prohibits the passage of a law 'respecting an establishment of religion.' "

From an objective review of the relevant authorities, it can be seen that the often cited Jeffersonian "wall of separation" is not a rigid and mechanistic principle, but is, rather, the product of a judicious and pragmatic balancing of the legitimate interests of society in general and those of religion in particular. The geographic boundaries of this wall are to be determined by its functional aspect: to secure the strict neutrality of government toward religion for the mutual benefit of both. Its purpose is surely not to enforce an artificial and calamitous hostility. It is not helpful, therefore, to speak in absolutist terms. Such an approach obscures and hampers the very difficult quest for an enlightened resolution of highly complex questions, one of which is here presented. It is necessary at this point to proceed to an analysis of the practical operation and effect of the New York statute in terms of the relevant constitutional principles and authorities.

It is submitted that Section 701.3 of the New York Education Law, insofar as it provides for the lending of secular textbooks to all school children, does not constitute an establishment of religion within the meaning of the First Amendment.

It perhaps needs to be emphasized that the New York State Textbook Law provides "that only non-sectarian textbooks shall be provided by a Board." These words are cited from paragraph 6(a), opinion No. 181, issued on July

1966, by Mr. Brind, counsel to the New York State Education Department, which is set forth, at pages 4-A *et seq* of the appendix to appellants' brief. The opinion goes on to declare that there is a "responsibility on each board to make a determination that any textbooks which it provides are of a non-sectarian nature."

The completely secular nature of the textbooks to be made available under the New York law was emphasized in the statement of policy set forth in Chapter 320 of the Laws of 1965. That statement notes that there is "an insufficient proportion of our population educated in the fields of *science, mathematics, foreign languages and other nonsectarian subjects.*" (emphasis supplied)

It is clear therefore that the New York Textbook Loan Law's obvious purpose and primary effect is to facilitate the secular education of *all* New York school children. This is without question an area of clear and undisputed public concern. Such indirect and incidental benefits which might accrue to any religious institution as a result of the operation of this statute are no different in kind or degree than those expressly sanctioned by the Court in *Everson, supra,* where the services to be provided are "so separate and so indisputably marked off from the religious function." Moreover, it is felt that New York cannot reasonably effectuate the secular purpose which prompted this legislation without indirectly aiding religious interests in the manner specified and sanctioned in *Everson.*

The New York statute authorizes the lending of textbooks in secular subjects directly to an individual pupil, whose parents or guardian assumes responsibility for such texts. The analogy of a child drawing books from a public library is striking. No texts are furnished directly to any religious institution.

As the Court stated in

Chance v. *Mississippi State Textbook Bd.*, 190 Miss. 453, 469, 200 So. 706, 710 (1941),

upholding the Mississippi textbook statute:

> "If throughout the statute there are words which arrest the attention of oversensitized suspicion and are seen by a jaundiced eye as symptoms of secular [sic] control, one may regain composure by viewing the state's book depository as a great public library of books available to all, which sells any book to anybody, and which, subject to reasonable regulation, allows the free use thereof to any child in any school."

The following language of the *Chance* opinion is also relevant to the New York law:

> "The religion to which children of school age adhere is not subject to control by the state; but the children themselves are subject to its control. If the pupil may fulfill its duty to the state by attending a parochial school it is difficult to see why the state may not fulfill its duty to the pupil by encouraging it 'by all suitable means.' The state is under duty to ignore the child's creed, but not its need. It cannot control what one child may think, but it can and must do all it can to teach the child how to think. The state which allows the pupil to subscribe to any religious creed should not, because of his exercise of this right, proscribe him from benefits common to all." (at 711)

As previously demonstrated, the premise underlying both the *Cochran* and *Everson* decisions, *supra*, is what may be

termed a "child benefit" theory. It is the child, as a member of a particular class of persons similarly situated, who is the direct and actual benficiary of the particular public welfare legislation enacted by the State, and not a religious institution. *Everson* holds that where the benefit furnished to the child is separate and indisputably marked off from the religious function, the enactment will not be held to be unconstitutional merely because some indirect benefit accrues to a religious institution as a by-product of the legislation.

In *Everson*, the Supreme Court conceded that the provision to reimburse parents of parochial school students might render incidental benefits to those schools in that it undoubtedly helped the children to attend. The Court also recognized (p. 17) the "possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State." And are these not precisely the same type of incidental benefits against which the appellants here inveigh and with respect to which they urge that they be declared unconstitutional as an "establishment of religion"? It may well be granted that the New York textbook statute helps a pupil to pursue his secular education in a parocial school, which satisfies the compulsory education requirements of state law, and, further, that a possibility exists that some pupils might not be sent to such schools if their parents were compelled to pay the costs of providing their children's secular textbooks when these would be provided free up to the maximum of ten dollars. *Everson*, however did not strike down the New Jersey bus-fare legislation for such reasons; and, we submit, the contrary arguments are no more persuasive here than they were in that case.

It is conceivable, though not persuasive, to argue that

the holding in *Everson* should be restricted to the particular type of general welfare legislation there validated, that concerning the physical safety of the child. It is true that the New Jersey statute in *Everson* did involve considerations of physical safety and that other examples mentioned in the course of the opinion as proper state action, *i.e.*, police, fire and sewerage services, were concerned with public health and safety. However, it is extremely difficult to see why any constitutional distinction should be drawn between various types of legitimate public welfare legislation; between physical safety, on the one hand, and educational welfare, on the other. *Everson* itself makes no such express distinction. The relevant inquiry there is only whether the legislative purpose is secular and public. Moreover, in

School Dist. v. *Schempp, supra,*

the establishment clause test enunciated by the Court, we reiterate, concerns itself only with whether the legislative purpose is secular and whether its *primary* effect is to advance or inhibit religion (p. 222). There is no differentiation made or suggested as to the types of secular purposes which are permissible. It would be absurd to contend that education is any less a legitimate object of a State's concern for the welfare of its children, than is physical safety. As has been mentioned, even the dissenting justices in *Everson* were unable to distinguish between the payments for transportation there involved and payments for other educational costs, including textbooks. We submit, therefore, that the public welfare legislation here at issue differs only in type, but not in principle from that sanctioned in *Everson.*

It is further submitted that the incidental benefits to church-related schools complained of are a necessary result of the State's comprehensive plan to aid elementary and

secondary school education in New York. New York could not reasonably have attained its permissible secular purpose by means which would not indirectly aid religious interests in the manner indicated. This is so because a very substantial number of New York students presently attend non-public schools in that state. Certainly the comprehensive purpose and effect on education envisaged by the New York legislature would be significantly reduced were such a sizeable portion of the student population to be excluded from benefits for the sole reason that they attend church-related schools.

It is very nearly anomalous that the State of New York is permitted to identify, sanction and extensively regulated the secular educational function performed by church-related schools as satisfying its compulsory education standards for elementary and secondary school pupils, but is precluded from so doing where those very standards are at issue. Certainly the State has been perceptive enough to separate the educational and religious aspects of church-related schools.

Moreover, a reversal of the decision of the Court of Appeals would cast serious doubt on New York's future participation in federal programs presently rendering aid to students attending church-related schools as part of a comprehensive effort to secure uniformly high educational standards. At this juncture, it is beyond question that the federal government holds educational excellence to be a national goal and has instituted various programs to provide benefits to students attending church-related schools. In particular, the *Elementary and Secondary Education Act of 1965*, Title II, § 201, 20 U.S.C.A. §§ 821-27 (Cum. Supp. 1965), authorizes the appropriation of funds for the purpose of making grants "for the acquisition of school library resources, textbooks, and other printed and published instructional materials for the use of children and teachers in public and private elementary and secondary

schools." The Act expressly provides for exclusive State selection and control of furnished materials and for public administration of the program. Similarly, Title II, § 205 of the Act, 20 U.S.C.A. § 241e (Cum. Supp. 1965), authorizes grants to local educational agencies for the purpose, among others, of providing educationally deprived children of low income families, who attend private elementary and secondary schools, with special educational services and arrangements, including textbooks.

A reversal of the decision of the Court of Appeals in this case would mean that New York state,—and presumably all other states, — would have to ask, when providing a benefit to school children, "What school do you attend?" If the answer is "parochial," that child must be denied the benefit accorded to all other students. This may raise serious questions under the free exercise clause of the First Amendment. See

> *Sherbert* v. *Verner,* 374 U.S. 398, 404, 410 (1963);
> *Thorpe* v. *Housing Authority,* 385 U.S. 670, 678-79 (1967) (concurring opinion)

Is a legislature thus to be prevented from enacting a comprehensive plan to raise general educational standards among all school children in a State?

It has long been established that parents have a constitutionally protected right to discharge their duty under state compulsory education laws by sending their children to religious rather than public schools, provided the school meets the secular educational requirements which the State properly may impose.

> *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1924).

See also

> *Griswold* v. *Connecticut,* 381 U.S. 479, 482 (1965).

If the decision of the Court of Appeals is reversed, however, an exercise of this constitutional right results in a forfeiture of the general public welfare benefits which would otherwise accrue. See *Thorpe* v. *Housing Authority*, supra at pp. 678-79. We submit that not only is this not a fair or prudent result, but one that is in no way required by the principle of neutrality established in *Everson*. For the foregoing reasons, we urge that the holding of the Court of Appeals that the New York textbook statute does not violate any clause of the federal Constitution, including the establishment clause of the First Amendment, be affirmed.

Respectfully submitted,

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